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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70–223

CENTRAL HARDWARE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

AND

RETAIL CLERKS UNION, LOCAL 725, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL–CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (A.74–90) is reported at 439 F. 2d 1321. The decision and order of the National Labor Relations Board (A. 65–74, 17–62) are reported at 181 NLRB 491.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1971, and the Company's petition for rehearing was denied on April 26, 1971. The petition for

a writ of certiorari was filed on June 1, 1971, and was granted on January 10, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a retail employer violates Section 8(a)(1) of the National Labor Relations Act by barring non-employee union representatives from engaging in union solicitation on its parking lot, where there are no reasonable alternative means of communication available to the union and the employer's parking lot (1) has been open to the general public without restriction, (2) interposes a broad buffer zone between the employer's retail establishment and the adjoining public land, and (3) adjoins without barrier similar parking lots of one or more adjacent retail establishments.

STATUTE INVOLVED

The relevant statutory provisions are set forth at pp. 90–91 of the separate Appendix.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. THE COMPANY'S STORES

In the spring of 1968, petitioner ("the Company") opened two retail hardware stores (known respectively as the East and West stores) on the outskirts of Indianapolis, Indiana (A. 21, 24; 99).[1] The Company began hiring about April 15, and had a work force of

[1] The stores, "unique in the hardware" business, operate on much the same basis as a large self-service supermarket (A. 22, 130). Although employees are stationed in the selling areas, they primarily advise the customers, who themselves select and re-

about 125 employees for each store by June 3, when the stores commenced operations (*ibid.*). The employees were drawn largely from various sections of Indianapolis (a city of about 500,000); the majority lived within 10 miles of the store at which they worked (A. 24; 134–136, 251). About 50 employees, some of whom had only rural route addresses, resided in surrounding towns from 10 to 25 miles away (A. 24; 120, 125, 240). Virtually all employees commuted to work by automobile; they entered the Company property through the same driveway entrances the customers used, and parked in designated areas of the parking lots (A. 23–25, 115, 126, 194).

The physical premises of the two stores are essentially identical: each is a supermarket-type structure (70,000 square feet), situated on a large expanse of parking area with space for about 350 cars (A. 22–23; 221, 227–228, 238–239). The store buildings are located at the rear of the property; the parking lots form an open area, approximately 350 feet wide and 260 to 375 feet deep, between the store and the street (A. 22–23; 238–239).[2] The property is not enclosed by

move merchandise from the shelves (*ibid.*). Shopping carts and baskets are provided in which goods may be carried to checkout lanes, located near the front of the stores (*ibid.*). In addition to the sales personnel, the Company also employs warehousemen in a separate storage area and porters who do maintenance work. Locker rooms and lunchrooms are provided for employee use during their free time, although employees also may eat on the parking lot (A. 22; 129–130, 116–117).

[2] Plot plans of the Company premises, including the immediately adjoining stores, are reproduced in the Appendix, pp. 238–239. The originals of these plans, General Counsels Exhibits 4 and 5, were drawn to scale and provide the basis for many of the distance measurements given.

fences or other physical barriers nor are the parking lots marked with signs restricting entry (A. 23, 68, n. 2; 115, 124, 113). The entrances to both lots are on heavily traveled highways with speed limits of 35–40 miles per hour. The adjoining streets do not have sidewalks; the only separation between Company premises and the highway is provided by grassy islands or berms (A. 22; 111–112, 117–119, 206–207, 244–250).

The following sketch illustrates the West store location (see map, A. 238).[3]

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[3] The unmarked boundaries of the Company's parking lot are indicated by broken lines on the sketch; the open areas represent the driving and parking areas.

Lafayette Road
FASHION SQUARE
Savings and Loan
Carpets/Gifts/Restaurant
West 38th Street
West Store
McDonald's

461-912—72——2

The West Store fronts on West 38th Street, near the intersection of that highway with Lafayette Road (A. 21; 111, 238). The most direct entry to Company premises is through a single driveway off 38th Street, from which the distance to the store entrance is approximately 400 feet across the parking lot (A. 24; 112, 238). This driveway, although on Company property, also serves as the sole access to a McDonald's Restaurant situated directly west of the Company's store. McDonald's customers must pass through the West Store parking lot in order to reach the adjoining restaurant parking area; the two parking areas are not physically separated or even differentiated from one another except by lines on their surface (A. 24; 112–113, 238).

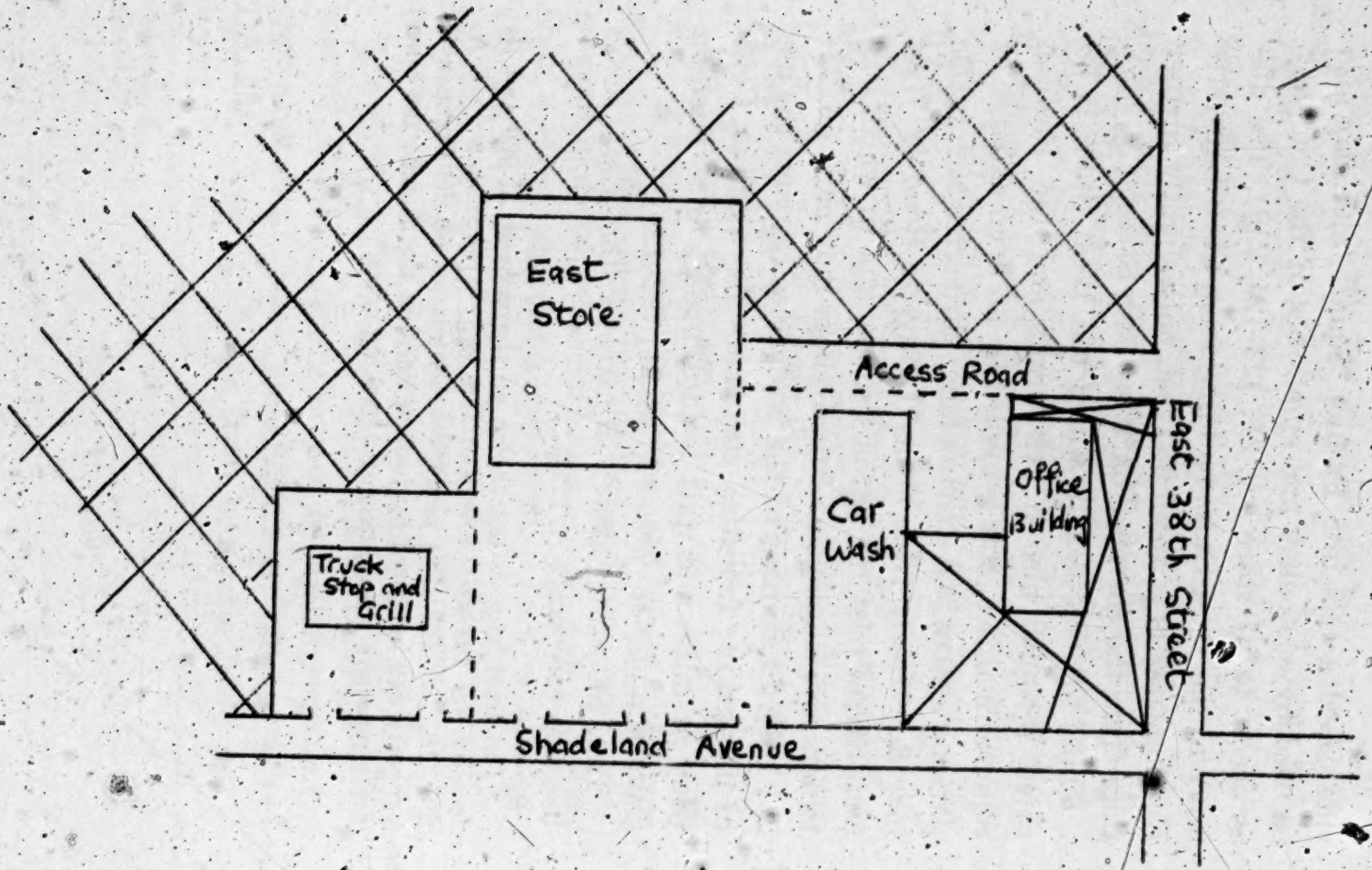
On the east, the store shares a common boundary with a small shopping plaza, known as Fashion Square, which faces Lafayette Road and contains a savings and loan association, a carpet store, a gift shop, a restaurant, and a small central parking facility (A. 23; 113, 121, 238). A distance of about 45 feet separates the West Store building from the nearest point in the Fashion Square complex (A. 138).

The parking lot of the Company's store merges with that of Fashion Square across an undifferentiated, open area about 75 feet long (A. 23–24; 123–124, 113–115, 238). Two driveways from Lafayette Road pro-

vide direct access into Fashion Square, and may also be used by customers and employees of the Company as access to its store (A. 24; 123–124, 238). The distance to the West Store building from these Lafayette Road entrances is about 450 feet, only slightly further than from the entrance on West 38th Street (A. 238). Thus, the complex in which the West Store is located includes also a restaurant and the Fashion Square facilities, and is unified by an open expanse of parking spaces and driving lanes through which traffic may flow freely from either Lafayette Road or West 38th Street past the various shops, and in which customers and employees of these shops may park (A. 22–23; 124). Since none of the businesses restricts the use of its parking facilities, customers may park on Company premises and walk to McDonald's or to Fashion Square, and *vice versa* (A. 23–24; 122–123).

The following sketch illustrates the East Store location (see map, A. 239).[4]

[4] The truck stop is not shown on the map at A. 239 and its location on the sketch is therefore only approximate; see A. 23; 118, 129, 167. The unmarked boundaries of the Company's property are indicated by broken lines on the sketch; the open areas represent the driving and parking areas.


East Store
Access Road
Office Building
Car Wash
East 38th Street
Truck Stop and Grill
Shadeland Avenue

The East Store fronts on Shadeland Avenue, a short distance from the junction of that highway with East 38th Street. Three entrances from Shadeland Avenue lead into the store's parking lot (A. 21, 23–24; 117–118, 239). Immediately adjacent to the lot on the south is a truck stop and grill, which also has a parking lot with direct access from Shadeland Avenue; there is no physical barrier between these two adjacent parking lots (A. 23–24; 117, 167). On the other side of the Company's store (to the north) are an office building and a car-wash establishment. An access road from East 38th Street, running parallel to Shadeland Avenue, runs behind these two establishments and into Company property; it covers a distance of about 680 feet (A. 24; 121–122, 118–119, 239). With the exception of the car wash, which has its own entrance and is surrounded by a fence, the entire area may be reached from Shadeland Avenue through either the truck stop or Company driveways, or from East 38th Street along the access road (A. 24; 127).

2. THE UNION ORGANIZING CAMPAIGN

In the last week of May 1968, about one month after the Company took possession of the two stores (but just prior to their opening), the Retail Clerks Union, Local 725, Retail Clerks International Association, AFL–CIO ("the Union"), began an organizational campaign among the employees at both stores. This campaign was conducted primarily on the parking lots, with Union agents engaging the employees in discussion and soliciting their signatures on union authorization cards (A. 26; 192). Although as many

as 9 organizers were involved in the first month of the campaign, after July 1 only two union agents were active (A. 203–204; Tr. 723, 726–727).

A few weeks after the initiation of the campaign, Company Vice President Reed addressed the employees on the store premises, told them of the Company's opposition to the Union, and announced that no employee solicitation, including "solicitations on behalf of unions," could be made on Company premises without prior management approval; he warned that "violation of the no-solicitation policy will result in disciplinary action including the possibility of dismissal" (A. 29–30, 44; 233–236, 132–133, 150–151).[5]

In June, on Company time, an anti-Union petition was circulated at the East Store and employee signatures solicited. The petition recited, in substance, that the signatory employees did not want the Union "harassing" or "annoying" them and that they did not want to join it (A. 67, 31–32; 138–141, 242). The petition was forwarded to the Company in late June or early July. The Company also received individual complaints from employees, a few of which were reduced to writing at the Company's request (A. 133, 136–138, 222–223, 228–229, 259–260). In response to the petition and complaints, on about July 15 the Company distributed to each employee a letter signed by its president stating that it would "keep all union organizers off our premises, both inside and outside" (A. 36; 237). This rule was thereafter enforced against the two

[5] Thereafter an employee Ragle was given a three-day disciplinary layoff for violating this rule (A. 30–31; 243, 152–156, 223–227).

remaining Union agents on several occasions (A. 36, 45–47; 92–95, 106–108, 163, 165–168).

Prior to July 22, primarily by means of on-site solicitation and through the aid of sympathetic employees, the Union compiled a list of approximately 80 per cent of the employees at the two stores (A. 26; 195–197, 187–188). The list could not be completed or kept up to date once the Company's no-solicitation rule was implemented (A. 197–198), and there was testimony that it would have been almost impossible to compile such a list without the original access to the parking lots (A. 197).

The Union organizing effort faltered after the Company ended the opportunity for communication with employees in the parking lots. Calls upon employees at home were attempted, but because of difficulty in finding many employees at home and in locating the rural homes of some of the employees such calls proved largely ineffective (A. 26–27; 98–99, 102–103, 185–187). As many as 60 house calls resulted in no more than 10 contacts (A. 102–103). The attempt at communicating through those calls was particularly inefficient because employee residences were dispersed throughout the Indianapolis metropolitan and surrounding rural areas (A. 98–99, 102–103, 185–187).

Other methods of communication proved unavailing. Solicitation or distribution of leaflets from the berms along the highways would have been impractical and inefficient under the circumstances (A. 27–28), the utilization of mass media was prohibitively expensive (A. 28), and the likelihood of any substantial casual contact between Union agents and employees in such

a large metropolitan area was remote (A. 29). The Board found:

> there [were] no reasonable means available to nonemployee representatives of the Union to reach [the Company's] employees with its organizing message other than by having those representatives meet them on [the Company's] parking lots [A. 29].

After promulgating its no-solicitation rule, the Company filed unfair labor practice charges against the Union with respect to the conduct of the Union agents. The Union subsequently filed charges against the Company. After an investigation, the Board's General Counsel dismissed the Company's charge and issued a complaint against the Company on the Union's charges (A. 2–12).

B. THE BOARD'S DECISION AND ORDER

The Board held that the Company's rule barring union solicitation by nonemployees was overly broad and violated Section 8(a)(1) of the National Labor Relations Act (A. 36–43, 68). In so concluding, the Board adopted the Trial Examiner's factual findings that Company premises provided the only reasonable means of Union access to the employees and that the parking areas, which were devoid of fences, gates, guards, or restrictive signs, and located in shopping complexes containing other enterprises, were "accessible to the public without limitation" (A. 43, 68, n. 2). These circumstances, the Board held, distinguished the case from *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, and brought it within the rule

of *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308.[6]

The Board ordered the Company, *inter alia*, to cease promulgating or enforcing any rule prohibiting nonemployee Union representatives from appearing on the parking lots adjacent to its stores and there soliciting employees on behalf of the Union (A. 57, 70).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals sustained the Board's conclusion that the Company's nonemployee no-solicitation rule violated the Act (A. 80–85).[7] The court agreed with the Board that the parking lots were "accessible to the public without limitation," that this fact distinguished *Babcock & Wilcox*, and that therefore "under the mandate of *Logan Valley Plaza*" the rule was "overly broad as it applied to [the] parking lots" (A. 84–85).[8] Accordingly, the court enforced the Board's order.

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[6] The Board also held that the Company's rule barring all employee solicitation on Company premises was overly broad and thus violated Section 8(a)(1) of the Act, and that the enforcement of this unlawful rule against employee Ragle violated Section 8(a)(3) and (1) (A. 33–35, 66). In addition, the Board held that the Company, by permitting an anti-union petition to be circulated on Company premises, discriminatorily enforced that rule, and thereby further violated Section 8(a)(1) (A. 66–67).

[7] The court also sustained the other findings of violation set forth in note 6, *supra*, but petitioner here challenges only the ruling with regard to nonemployee solicitation on the Company's parking lots.

[8] Judge Gibson dissented from the court's decision insofar as it sustained the Board's finding that the rule barring nonemployee solicitation was invalid (A. 87–90).

ARGUMENT

A RETAIL EMPLOYER VIOLATES SECTION 8(a)(1) OF THE NATIONAL LABOR RELATIONS ACT BY BARRING NONEMPLOYEE UNION REPRESENTATIVES FROM ENGAGING IN UNION SOLICITATION ON ITS PARKING LOT, WHERE THERE ARE NO REASONABLE ALTERNATIVE MEANS OF COMMUNICATION AVAILABLE TO THE UNION AND THE EMPLOYER'S PARKING LOT (1) HAS BEEN OPENED TO THE GENERAL PUBLIC WITHOUT RESTRICTION, (2) INTERPOSES A BROAD BUFFER ZONE BETWEEN THE EMPLOYER'S RETAIL ESTABLISHMENT AND THE ADJOINING PUBLIC LAND, AND (3) ADJOINS WITHOUT BARRIER SIMILAR PARKING LOTS OF ONE OR MORE ADJACENT RETAIL ESTABLISHMENTS

A. INTRODUCTION AND SUMMARY

Section 7 of the National Labor Relations Act grants employees "the right to self-organization to form, join or assist labor organizations." This guarantee includes both the right of the "union, its members, and officials * * * to discuss with and inform the employees" about the advantages of self-organization and also the "[n]ecessarily correlative" right of the employees "fully and freely to discuss" organizational matters. *Thomas* v. *Collins*, 323 U.S. 516, 534. Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

This case involves the validity of the Board's determination that the Company committed an unfair labor practice by barring on-site communication between its

employees and Union agents. "[T]he first basic principle in the resolution of this type of labor-management conflict is that employee contact with organizers is necessary for the purpose of discussion and free choice. A second basic principle recognizes the importance of the employee's work place as the focal point in the organizational struggle." Gould, *Union Organizational Rights and the Concept of "Quasi-Public" Property,* 49 Minn. L. Rev. 505, 513 (1965). By its very nature the Company's no-solicitation rule imposed restraints on the employees' right to self-organization.

On the other hand, not every restraint imposed by an employer on the exercise of organizational rights constitutes an unfair labor practice; there also is an "equally undisputed right of employers to maintain discipline in their establishments." *Republic Aviation* v. *National Labor Relations Board,* 324 U.S. 793, 797–798. The reconciliation and accommodation of these frequently conflicting interests—the organizational rights of employees and the property rights of employers—"must be obtained with as little destruction of one as is consistent with the maintenance of the other." *National Labor Relations Board* v. *Babcock & Wilcox Co.,* 351 U.S. 105, 112. Congress entrusted the Board with the primary responsibility for making this accommodation, and its judgment, if reasonable, should be accepted by the reviewing court. Cf. *National Labor Relations Board* v. *Fleetwood Trailer Co.,* 389 U.S. 375, 378.

In *Babcock & Wilcox, supra,* industrial employers had prohibited distribution of union literature by non-

employee union organizers on private parking areas adjacent to the employers' manufacturing plant. The parking areas were enclosed or isolated from other businesses or public areas, and they were restricted to the use of employees and deliverymen. The Court held that the employers' no-solicitation rules did not constitute unfair labor practices under Section 8(a)(1). It stated (p. 112):

> an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. * * *

In *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, a state court had issued an injunction against peaceful organizational picketing by union agents on a parking lot located within a shopping center. The parking lot was open to the public and was shared by the two stores operating in the shopping center; the union's picketing was directed against one of the stores. The Court held that the injunction violated the union representatives' constitutional right of free speech. The Court stressed that the property in question had been opened to the public; in the circumstances, the property rights of the employer had been voluntarily diluted to the point where they became merely the assertion of "[n]aked title" and therefore the important speech and organizational rights asserted by the union representatives must predominate over such property interests. *Logan Valley,*

391 U.S. at 324. To rule otherwise, the Court noted, would permit the rapidly increasing number of suburban retail establishments to immunize themselves from traditional forms of "on-the-spot public criticism" by creating a *"cordon sanitaire"* of parking lots around them. *Id.* at 324–325.

The facts in the present case distinguish it from *Babcock* and bring it close to *Logan Valley*. Although the parking areas to which the no-solicitation rule was applied are the property of the employer, they are open to and used by the public without restriction and, as the Board found, provide the only reasonable means of Union access to the employees—a factor upon which the Court relied in *Logan Valley* (391 U.S. 321–323). We submit that, in reconciling the conflicting interests of the employer and the Union, the Board properly concluded that on the facts of this case the protection of the employees' organizational rights outweighed the employer's interest in using its property as it sees fit, and that *Logan Valley* rather than *Babcock* controls.

B. THE BOARD PROPERLY RECONCILED THE CONFLICTING INTERESTS OF THE EMPLOYER AND EMPLOYEES IN HOLDING THAT THE COMPANY'S APPLICATION OF ITS NO-SOLICITATION RULE TO THE PUBLIC PARKING LOTS INVOLVED IN THIS CASE INTERFERED WITH THE EMPLOYEES' ORGANIZATIONAL RIGHTS IN VIOLATION OF SECTION 8(a)(1) OF THE ACT.

1. The Law Prior to Logan Valley

In determining the legality in various contexts of company rules barring union solicitation, the Board has been sensitive to the need for a practical accommodation of the conflicting interests of employer and

employees. In *Peyton Packing Co.*, 49 NLRB 828, the Board enunciated the principle that a plant rule barring union solicitation by *employees* during working hours was presumptively lawful, while a similar rule covering non-working time violated the Act, unless it were shown that the broader ban was necessary to maintain production or discipline. The Board emplained (*id.* at 843):

> Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours * * *. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. * * *[9]

[9] The Board has refined the *Peyton Packing* rule in the light of the variant factual situations which have emerged. Thus, because of the greater danger of disruption posed by distribution of literature, as distinguished from mere solicitation, the Board held that an employer may lawfully bar employee distribution activities in operating areas of the plant on both working *and* non-working time. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615; *National Steel Corp.* v. *National Labor Relations Board*, 415 F. 2d 1231, 1233 (C.A. 6). Similarly, the obvious necessity for order on the selling floor of a retail establishment led the Board to uphold broad rules banning solicitation and distribution at any time in such areas. *May Dept. Stores*, 59 NLRB 976, enforced, 154 F. 2d 533 (C.A. 8), certiorari denied, 329 U.S. 725; *Montgomery Ward & Co., Inc.* v. *National Labor Relations Board*, 339 F. 2d 889 (C.A. 6).

In *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, the Court upheld, as a proper "adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments" (pp. 797–798), the Board's invalidation of company rules barring solicitation and other union organizational efforts by employees in the plant or on company-owned parking lots, during non-working time.

In *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, however, the Court rejected the Board's application of the same principles to non-employee organizers. In that case union agents had sought access to the restricted parking lots of large industrial employers for the purpose of distributing union literature to the employees. Because only manufacturing operations were conducted at the plant, only employees or deliverymen normally entered the premises, which were located in rural areas on extensive tracts of land that were either wholly or partially fenced off.[10] The Court rejected the Board's theory that non-

[10] The Court decided three consolidated cases, involving different employers, in its *Babcock* opinion. The Babcock & Wilcox Company occupied about 100 acres of land several miles outside Paris, Texas, a community of about 21,000. The plant buildings were totally fenced, employee access being through gates at which the employees would punch in and out daily. The employee parking lot was just outside the fenced area and could be reached only by a private road running through company property. *Babcock & Wilcox Co.*, 109 NLRB 485, 491. In *Ranco, Inc.*, 109 NLRB 998, 1003–1004, the second case, the employer's entire 30-acre tract was fenced, including the park-

employee organizers were entitled to a presumption in favor of the validity of non-working time on-site solicitation, stating, as noted above, that "an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." (351 U.S. at 112).

Neither *Republic Aviation* nor *Babcock & Wilcox* dealt with the question of the proper accommodation of employer and the employee rights where the employer had diluted his property interest by opening his property to the general public for his own economic advantage. The Board considered this question in *Priced-Less Discount Foods, Inc.*, 162 NLRB 872. There, in holding that an employer unlawfully evicted a nonemployee organizer from the parking lot of a grocery store that stood alone, the Board noted that other groups had been allowed solicitation privileges and that the general public also had been invited there. The "parking lot served the same public function" as a similar facility in a shopping center:

---

ing area, and the plant premises were surrounded by a second fence, at which guards were posted to check the identity of employees as they came to work. In *Seamprufe, Inc.*, 109 NLRP 24, 28–29, the third case, the plant was located on a 25-acre tract on the outskirts of Holdensville, Oklahoma, a town of about 6,000. The front of the company's property was bounded by a fence; employee parking was in the rear of the property and could be reached only by a private road running through the property.

"'Customers, employees, supply trucks and presumably salesmen and service people used it. The public used it; and because of the supermarket's location on the outskirts of the city it obviously could not have catered to the public without the support of the parking lot." *Id.* at 874.[11]

2. The impact of Logan Valley

This Court's subsequent decision in *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 391 U.S. 308, indicates that an accommodation different from that made in *Babcock & Wilcox* is appropriate where the employer's property has been opened to the general public. In *Logan Valley,* nonemployee union agents had been engaged in peaceful organizational picketing of a retail supermarket. The supermarket was one of two stores operating within a shopping center [12] and the picketing took place on the shopping center parking lot and in the parcel pickup area of the supermarket. The owner-lessor of the shopping center obtained a broad state court injunction against the picketing. This Court held that the injunction violated the Fourteenth Amendment by

[11] See also *Marshall Field & Co.* v. *National Labor Relations Board,* 200 F. 2d 375 (C.A. 7). There, the employer excluded nonemployee organizers from a privately owned street running through the center of a large downtown department store. The street was used "to a limited extent by company employees, and also by the public, to enter the building." *Id.* at 377. Observing that the disputed property "does partake of the nature of a city street, even though owned by the company" (*id.* at 380), the court sustained the Board's finding that the expulsion of union agents therefrom violated Section 8(a)(1) of the Act.

[12] Other enterprises moved in later. 391 U.S. at 310.

unduly restricting the union representatives' right of free speech.

The Court's analysis began with the premise that "peaceful picketing carried on in a location open generally to the public" is normally constitutionally protected. 391 U.S. at 313. The Court then noted that "[t]he shopping center premises are open to the public to the same extent as the commercial center of a normal town." *Id.* at 319. Finding no "significant claim to protection of the normal business operation of the property" (*id.* at 324), the Court concluded that the property rights in question had been voluntarily diluted to the mere assertion of "[n]aked title" and that the owner could advance "no meaningful claim to protection of a right of privacy" (*ibid.*).

The Court further concluded that the important speech rights asserted by the union representatives must prevail over such thin property interests, at least where those rights were being exercised "in a manner and for a purpose generally consonant with the use to which the property is actually put." *Id.* at 319–320. To rule otherwise, the Court noted, would permit the rapidly increasing number of suburban retail establishments to immunize themselves from traditional forms of "on-the-spot public criticism" by creating a "*cordon sanitaire*" of parking lots around them. *Id.* at 324–325.

Logan Valley thus shows that an employer's right to expel union agents from his property is substantially diluted where he has opened that property to the general public. Where the property has been so opened, nondisruptive union solicitation on the parking lot may not be subjected to unreasonable restraints

by the employer, at least where that employer has interposed such a broad buffer zone between his property and the adjoining public land that other methods of on-site communication are rendered ineffective.

Logan Valley confirms the soundness of the Board's balancing-of-interests approach in evaluating the application of no-solicitation rules to nonemployees. This analysis of *Logan Valley* does not require us to contend, as the Company urges (Br. 10–11), that earlier decisions on the issue, especially *Babcock & Wilcox*, are abrogated or overruled.[13] To the contrary, the Court, in *Logan Valley*, simply took into account factors that had not been considered or were not significant in the prior decisions, which involved different factual situations.

3. The Board properly balanced the conflicting interests

"The determination of the proper adjustments [of organizational and property rights] rests with the Board. Its rulings, when reached on findings of fact supported by substantial evidence on the record as a whole, should be sustained by the courts unless its conclusions rest on erroneous legal foundations." *Babcock & Wilcox*, 351 U.S. at 112, footnote omitted. In *Babcock*, the Court invalidated the Board's adjustment because it rested upon an erroneous legal foundation stemming from the Board's "fail[ure] to make a distinction between rules of law applicable to

[13] In a number of recent cases where the property has not been opened to the public, the Board has applied *Babcock & Wilcox* to bar entry of nonemployee organizers. *Monogram Models, Inc.*, 192 NLRB No. 99; *Farah Mfg. Co.*, 187 NLRB No. 83.

employees and those applicable to nonemployees." *Id.* at 113, footnote omitted). In the present case, on the other hand, the Board properly took cognizance of the pertinent legal and policy considerations that have been enunciated in this Court's decisions, and carefully weighed and reconciled the competing factors. Although one might differ with the weight the Board accorded to these factors and the inferences the Board drew from the largely undisputed facts in this case, those judgments were reasonable and lay within the Board's discretion, and therefore they should not be disturbed by the courts.

The balancing of the organizational and speech rights of employees against the employer's right to control the use of his property must be made in the context of the particular factual setting. The property interests and factual situation involved in the present case strongly resemble those in *Logan Valley*. In both cases, the organizational rights asserted are substantial, the parking lots are open to the public and provide the only effective means the union has for communicating with the employees, and the owner's property rights in the public parking areas do not involve "any significant claim to protection of the normal business operation of the property." *Logan Valley*, 391 U.S. at 324. Under these circumstances, "[t]he interest of the [Union] thus rests upon the solid substance of public policy and constitutional right; the interest of the [Company] lies in the shadow cast by a property right worn thin by public usage." *Schwartz-Torrance Investment Corp. v. Bakery Workers Local 31*, 61 Cal. 2d 766,

774–775, 394 P. 2d 921, 926, certiorari denied, 380 U.S. 906.

a. The right of union solicitation

The right of solicitation for union membership asserted here, "to discuss with and inform the employees," and the correlative right of the employees "fully and freely to discuss and be informed concerning this choice, privately or in public assembly * * * are protected by the First Amendment." *Thomas* v. *Collins*, 323 U.S. 516, 534. Contrary to the Company's argument (Br. 12–13), the fact that, because the right of solicitation is also guaranteed by Section 7 of the Act, this case arises in a statutory rather than a constitutional setting does not render the reasoning of *Logan Valley* inapplicable. As the Court recognized in that case, "[t]he more an employer, for his own advantage, opens property for use by the public in general, the more do his rights become circumscribed by the *statutory and constitutional* rights of those who use it," 391 U.S. at 325, quoting from *Marsh* v. *Alabama*, 326 U.S. 501, 506 (emphasis added). Indeed, the inviolability of these organizational rights is only further enhanced by the specific statutory guarantee, which protects them not just against state infringement, but against private employer interference as well.

The Company's contention (Br. 12–15) that lesser rights should be afforded to solicitation than picketing inverts the established priorities in the area of free speech. Picketing is speech *plus* the physical patrolling of a particular location, and accordingly, it has been "subjected to controls that would not be constitu-

tionally permissible in the case of pure speech." *Logan Valley, supra,* 391 U.S. at 313; *Hughes* v. *Superior Court of California,* 339 U.S. 460; *Int'l Brotherhood of Teamsters, Local 695* v. *Vogt, Inc.,* 354 U.S. 284. "[D]istribution of circulars * * * may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication." *Hughes* v. *Superior Court, supra,* at 464–465.

Solicitation, whether consisting solely of a request to join the union or coupled with discussion of the merits of unionization or the distribution of an authorization card, is one of the "other modes of communication" which more nearly approach pure speech. See *Staub* v. *City of Baxley,* 355 U.S. 313, 321–325. Furthermore, solicitation normally creates less customer annoyance or loss of sales than picketing and it involves a "genuine need to get as near as possible to the employee's place of work." Gould, *Union Organizational Rights and the Concept of "Quasi-Public" Property,* 49 Minn. L. Rev. 505, 507 (1965). If anything, therefore, solicitation may well warrant a broader privilege than that accorded picketing.

The Company's further argument (Br. 12–15) that a communication directed to customers, as in *Logan Valley,* merits greater protection than one directed to employees, as here, is similarly untenable. It has no constitutional basis and is inconsistent with the grant of organizational rights to employees in Section 7 of the Act. It would lead to the anomalous result that the

Union has greater rights in communicating with the casual customers who used the parking lot than it has in communicating with the employees, who spend a major part of their waking hours at the stores and are the people directly involved in the Union's dispute with the Company.[14]

The Court in *Logan Valley* emphasized that the pickets there, by informing the public of the store's nonunion conditions, were furthering "a purpose generally consonant with the use to which the property is actually put"; their activity "concerned the manner in which that particular market was being operated." 391 U.S. at 320, n. 9. This test was met here, too. Union agents in each instance were seeking to change the store's nonunion condition. Instead of doing it indirectly, by appealing to customers to cease patronizing the store until it was unionized, the union agents here appealed directly to the employees working at the store to join the Union. The store employees, no less

[14] The weakness of the argument is further shown by comparing the content of the two types of communication. The pickets, by patrolling the area in front of the store, appeal to the public to withhold patronage. If the picket line is successful, the economic consequences for the employer will be severe. Moreover, the obvious way to relieve this pressure is for the employer to recognize the union—a form of union organization which is particularly undesirable, since it substitutes economic coercion for employee free choice. For this reason, recognitional picketing has been subjected to strict regulation by Congress in Section 8(b)(7) of the Act, 29 U.S.C. 158(b)(7). Solicitation of employees, by contrast, neither seeks nor creates a detrimental effect on the employer's business and achieves organization in a manner both fair to the employees and sanctioned by the Act. *National Labor Relations Board* v. *Gissel Packing Co., Inc.* 395 U.S. 575.

than the store customers, have a legitimate interest in learning about allegedly unsatisfactory working conditions and in improving them.[15]

The Company in effect attempts to avoid the impact of *Logan Valley* on the ground that First Amendment guarantees necessitate the imposition of more severe limitations on an employer's right to control his property than can be justified by the statutory guarantees of the National Labor Relations Act. But Congress has specifically granted employees the right to self-organization. In vindicating that right, the Board may go beyond what the First Amendment would require. The Board's conclusion that the Company's no-solicitation rule violates the Act was valid without re-

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[15] The Company impliedly suggests (Br. 22) that the organizational rights here were weakened because the Union campaign was allegedly overly aggressive and involved harrassment of and interference with the employees. Even assuming that such interference occurred—and the Company has not shown that it did—the Company's proper action would have been to seek relief against the objectionable aspects of the conduct. Cf. *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131, 138; *Auto Workers* v. *Wisconsin Board*, 351 U.S. 266. It could not through self-help preclude a protected form of collective activity. As the Court stated in *Logan Valley*, obstructive picketing, if any existed, would have entitled a state court to "limit the location and manner of the picketing or the number of pickets within the mall in order to prevent interference with either access to the market building or vehicular use of the parcel pickup area and parking lot." 391 U.S. at 321. The state court could not, however, rely upon the occurrence of some misconduct to hold that "'picketing and trespassing' can be prohibited absolutely." *Ibid.* See *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 729–735; *Youngdahl* v. *Rainfair*, *supra*, 355 U.S. at 139–140.

gard to whether that rule also violates the First Amendment.[16]

b. The openness of the Company's parking lots

As in *Logan Valley*, each of the Company's stores adjoins a large parking area with entrances from either of two intersecting public highways. The lots are not fenced, nor are they marked with signs restricting entry in any way, either with respect to purpose or identity. Entry to the premises is virtually unlimited; not only are employees and service personnel welcome, but the public in general is implicitly invited to come onto the lot, to park and to shop in the stores. Such access by the public is, indeed, the very purpose of the Company's operation and "the reason for its existence" (*Lombard* v. *Louisiana*, 373 U.S. 267, 275, concurring opinion of Mr. Justice Douglas)—to attract the public as potential customers.

Because of the stores' locations, one of the essential components of this attraction is the availability of off-street parking on the Company's property. "[I]t obviously could not have catered to the public without the support of the parking lot." *Priced-Less Discount Foods, Inc.*, 162 NLRB 872, 874. As in *Logan Valley*, the Company here has "for [its] advantage * * *

[16] The Court's decision in *Logan Valley* rested on constitutional grounds, whereas here the Court need only decide whether the National Labor Relations Act authorizes the accommodation made by the Board. The three dissenting Justices in *Logan Valley* refrained from expressing any view on the effect of the National Labor Relations Act. 391 U.S. at 329, n. 3 (Mr. Justice Black); 333 (Mr. Justice Harlan); 340 (Mr. Justice White).

opened up [its] property for use by the public in general." 391 U.S. at 325.

Moreover, the Company's two stores are so situated that the implicit invitation to the public extends beyond Company customers. Use of the property by customers of other merchants, or by joint customers of the Company and the adjoining stores, is both convenient and probable. For instance, the West Store shares a common driveway entrance with the adjoining McDonald's restaurant and no barrier separates the two parking areas (A. 112, 238). Since this is the only access to McDonald's (A. 113), persons going there to eat must pass through the Company's lot and the opportunity for a one stop shop-and-eat outing is readily apparent.

Similarly, on the other side of the West Store is a small shopping plaza containing a savings and loan association, a carpet store, a gift shop, and a restaurant. The parking area for this plaza opens onto the Company's lot across an undifferentiated border of approximately 75 feet; indeed, two of the three normal entrances onto the Company's premises are through this area, past the front of the plaza shops. A. 24, 123–124, 238.) Again, the potential for one stop shopping—parking at the Company's lot and walking to the plaza, or *vice versa*—is obvious.[17]

[17] Similarly, the East store's parking lot shares a common, open border with the lot of the adjoining truck stop and grill; this creates similar exchange possibilities (A. 23–24, 118).

The Company asserts that the parking lot was "closely regulated so as to insure use solely by its customers and employees" (Br. 2, 3, 6–7, 15). But the record indicates no such restrictions. For example, when the manager of both stores was questioned regarding the possibility of an exchange of customers between the adjoining plaza and the West Store, he conceded that "sure, it [happens] because they could walk across" and stated that the Company would not take steps to discourage or deter such traffic (A. 123).

This was, of course, also the situation in *Logan Valley*. There, as here, the individual proprietors invited the general public to use the privately-owned parking facilities, either to shop at their stores or at the adjoining shops. Once premises have been generally opened to the public, any impairment of a property right can be, at best, "theoretical." *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local 31*, 61 Cal. 2d 766, 394 P. 2d 921, certiorari denied, 380 U.S. 906.

The Company contends (Br. 17) that the Court in *Logan Valley* viewed the shopping center there as the "functional equivalent" of a community business block in some sense other than its general openness to the public. To be sure, the Court did discuss the similarity of the shopping center there to the business district of the privately owned company town in *Marsh* v. *Alabama*, 326 U.S. 501. But the facts of *Logan Valley* show that the shopping center was

the equivalent of a municipal or quasi-municipal business block only in the sense that it was open to the general public for the purpose of shopping at the various stores. As Mr. Justice White pointed out in his dissent (391 U.S. at 338):

> In no sense are any parts of the shopping center dedicated to the public for general purposes or the occupants of the Plaza exercising official powers. The public is invited to the premises but only in order to do business with those who maintain establishments there. * * * There is no general invitation to use the parking lot, the pick-up zone, or the sidewalk except as an adjunct to shopping. No one is invited to use the parking lot as a place to park his car while he goes elsewhere to work. The driveways and lanes for auto traffic are not offered for use as general thoroughfares leading from one public street to another. Those driveways and parking spaces are not public streets and thus available for parades, public meetings, or other activities for which public streets are used. * * * [18]

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[18] Although the Company repeatedly states that the Court in *Logan Valley* considered "all" the features of the shopping center, the only such feature which the Company actually cites is the presence of sidewalks for "pedestrians going to and from their cars and from building to building" and the "clearly marked out roadways in the parking areas for the use of vehicular traffic entering and leaving the mall" (Br. 17). These facilities, however, are purely for the use and convenience of the shopping public. They no more transform a shopping center into the literal equivalent of a municipal business block than does the sidewalk in front of the Company's building or the in-out flow of traffic in the Company's parking lot.

The Company's parking lots here were open to the public and functioned as a "business block" to the same extent as did the parking areas of the shopping center in *Logan Valley*.[19]

c. The Union's need to use the parking lots for effective communication with the employees

In *Babcock & Wilcox* the Court pointed out that there could be effective communication between the union and employees without on-site distributions. It noted that there were other available channels of communication, since "[t]he plants are close to small well-settled communities where a large percentage of the employees live * * * [and] [t]hough the quarters of the employees are scattered they are in reasonable reach." 351 U.S. at 113.

In contrast, in this case, there was ample evidence that solicitation on the parking lots was necessary to ascertain the names of the Company's employees and to communicate with them effectively.[20] The Board therefore properly found that "there was no reasonable means available to nonemployee representatives of the Union to reach [the Company's] employees with its organizing message other than by having these representatives meet them on [the Company's]

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[19] *National Labor Relations Board* v. *Solo Cup Co.*, 422 F. 2d 1149 (C.A. 7), is not to the contrary. Indeed, the court there apparently accepted this interpretation of *Logan Valley*, but held that the employer's industrial park was not "open to public use." The court pointed out that "the public was not invited into the" industrial park and "had no reason to enter the area." *Id.* at 1151.

[20] See the statement, pp. 11–12, *supra*.

parking lots" (A. 29, 68 n. 2).[21] *Babcock* itself recognized (351 U.S. at 112) that a rule against nonemployee solicitation would be impermissible where "reasonable efforts by the union through other available channels of communication will [not] enable it to reach the employees with its message." Similarly, *Logan Valley* stressed that the state court injunction "substantially hinder[ed] the communication of the ideas which [the union sought] to express to the patrons of" the store there. 391 U.S. at 323.

The parking lots around the Company's stores created a buffer zone—of dimensions generally comparable with those of the shopping center in *Logan Valley*—which the Company used to insulate its employees from communication with union agents. In *Logan Valley*, the distance across the parking lot to the store, depending on the entrance used, ranged from 350 to 500 feet. 391 U.S. at 310–311. At the Company's West store, the shortest distance was 350 feet, and at the East store 260 feet. The effect in the present case of permitting the Company to preclude the Union from the parking lots, as in *Logan Valley*, would be seriously to curtail the right of workers to protest or communicate at the site of the dispute—

[21] See also Notes, "*Not As a Stranger*": *Non-employee Union Organizers Soliciting on Company Property*, 65 Yale L.J. 423, 427 (1956):

"* * * In a complex industrial society employees cannot effectively exercise the right of self-organization without access to outside counsel, information, and other aid * * *

"Employees' right to outside aid is valueless, however, unless it includes the right to utilize that assistance at the place of work." (Footnotes omitted.)

a right which has long been recognized to exist in the traditional downtown setting."[22]

Moreover, the exclusionary effect of the Company's no-solicitation rule here was more stringent than that in *Logan Valley*. See 391 U.S. at 311. Here the employer not only kept out nonemployee organizers, but also banned all on-premises union activity by employees as well. Such a broad rule, even in a retail store, is unlawful (see *supra*, pp. 17–19); the Company went further and enforced that rule, imposing a three day suspension on employee Ragle for her union solicitation. Finally, at the same time, the Company itself utilized company time and property to campaign against the Union and expressly sanctioned similar anti-union activity by the employees (*surpa*, p. 10).

The Company's broad employee no-solicitation rule would, of itself, inevitably blunt "the thrust of the union organizational drive." *National Labor Relations Board* v. *United Aircraft Corp.*, 324 F. 2d 128, 131 (C.A. 2). When combined with management's use of

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[22] The Company asserts that distribution of literature could have been safely accomplished from the "level grassy areas" separating the Central Hardware premises from the public street (Br. 4). But these areas are identical to the "earthen berms" which the Court specifically found insufficient for the same purpose in *Logan Valley*: "The requirement that the picketing take place outside the shopping center [on the berms] * * * substantially hinder[s] the communication of the ideas which the [union agents] seek to express * * *." 391 U.S. at 321–323. Indeed, the difficulties emphasized by the Court—the inefficiency and physical danger of displaying placards to motorists entering or exiting from a busy public highway—would obviously be multiplied where, as here, the purpose of the union agents is to engage the employees in conversation.

company time for anti-union purposes, it creates a "glaring imbalance in organizational communication." *Montgomery Ward & Co.* v. *National Labor Relations Board*, 339 F. 2d 889, 891 (C.A. 6), enforcing, 145 NLRB 846, 848–850. Employee free speech rights are totally cut off at the most critical time and place, while the employer continues to publish his negative message in the most favorable "captive audience" circumstances. In such situations, the Board, with court approval, has held that the employer's refusal, upon request, to allow the union onto his private property for purposes of an "equal opportunity" reply violates the Act. *Montgomery Ward & Co., supra; Bonwit Teller, Inc.* v. *National Labor Relations Board*, 197 F. 2d 640 (C.A. 2).

The Company cannot assert that the Union's need to use the parking lots must be balanced here against a "significant claim to protection of the normal business operations of [its] property". *Logan Valley*, 391 U.S. at 324. A parking lot which has been opened to the public is normally characterized by some activity or commotion, such as movement of automobiles and pedestrians, and orderly discussion there is neither disruptive, nor out of place, nor damaging to business. Thus, the right the Company here asserts is neither a traditional right to full control of private property nor the right to protect legitimate business interests. Rather the right it asserts is to prohibit a particular activity—union solicitation—on property which for other purposes had become widely open to the public.

Indeed, the Company's rule against solicitation was discriminatory on its face: its purpose was to "keep all

union organizers off our premises" (A. 36; 237).[23] The rule applied by its own terms only to Union solicitation on parking lots otherwise "accessible to the public without limitation" (A. 48). *Babcock* recognized that "the employer's notice or order [may] not discriminate against the union" (351 U.S. 112), and in that case there was no evidence that the employer's posted notices or its rules were in fact discriminatory.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[23] The Company states that certain other persons were also excluded from the parking lots (Br. 7). The testimony on this issue suggests that even persons soliciting money contributions were selectively permitted entry (A. 131). Solicitations of this kind could be more disruptive of normal business and more annoying to customers than discussions between union agents and employees on the parking lots.

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